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In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 726

RUBY JEAN GRANNIS AND THE BRANCH BANKING AND TRUST COMPANY, FAYETTEVILLE, NORTH CAROLINA, ADMINISTRATORS OF THE ESTATE OF EDWARD W. GRANNIS, DECEASED, ET AL., PETITIONERS

v.

THE UNITED STATES OF AMERICA

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

There was no opinion in the district court. The judgment on the verdict of the jury appears at page 49 of the record. The order denying respondent's motion for judgment notwithstanding the verdict or, in the alternative, for a new trial appears on page 58 of the record. The opinion of the Court of Appeals for the Fourth Circuit (R. 91-106) is reported at 172 F. 2d 507.

JURISDICTION

The judgment of the Court of Appeals was entered February 3, 1949 (R. 106). The petition for rehearing, filed February 26, 1949, was denied on March 7, 1949 (R. 123). The petition for a writ of certiorari was filed on April 15, 1949. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether the United States tried the case solely on the theory of a conspiracy to violate the false claims statute and whether the judgment of the court below was based exclusively on a theory of individual violations of the statute.

2. Whether, in view of the uncontradicted testimony of Government witnesses and the absence of any evidence offered by defendants, there was any controverted issue of fact in the circumstances of this case which entitled defendants to a jury trial.

3. Whether an action by the United States for damages and forfeitures under the false claims statute is preserved against abatement upon the death of a defendant by 28 U. S. C. 2404 as a civil action for damages commenced by the United States.

STATUTES INVOLVED

Section 3490 and Section 5438 (for the purpose of Section 3490) of the Revised Statutes (31 U. S. C. 231) provide in pertinent part as follows:

> SEC. 3490. Any person not in the military or naval forces of the United States, or in the

militia called into or actually employed in the service of the United States, who shall do or commit any of the acts prohibited by any of the provisions of section fifty-four hundred and thirty-eight, Title "Crimes," shall forfeit and pay to the United States the sum of two thousand dollars, and, in addition, double the amount of damages which the United States may have sustained by reason of the doing or committing such act, together with the costs of suit; and such forfeiture and damages shall be sued for in the same suit.

SEC. 5438. Every person who makes or causes to be made, or presents or causes to be presented, for payment or approval, to or by any person or officer in the civil, military, or naval service of the United States, any claim upon or against the Government of the United States, or any department or officer thereof, knowing such claim to be false, fictitious, or fraudulent, or who, for the purpose of obtaining or aiding to obtain the payment or approval of such claim, makes, uses, or causes to be made or used, any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry, or who enters into any agreement, combination, or conspiracy to defraud the Government of the United States, or any department or officer thereof, by obtaining or aiding to obtain the payment or allowance of any false or fraudulent claim, * * * every person so offending in any of the matters set forth in this section shall be imprisoned at hard labor for not less

than one nor more than five years, or fined not less than one thousand nor more than five thousand dollars.

28 U. S. C. 2404 provides as follows:

> A civil action for damages commenced by or on behalf of the United States or in which it is interested shall not abate on the death of a defendant but shall survive and be enforceable against his estate as well as against surviving defendants.

STATEMENT

1. *Proceedings Below.*

This suit was brought by the United States to recover damages and forfeitures for violation of the false claims statute (R. S. 3490, 5438, 31 U. S. C. 231) (R. 1, 7). After the Government put in its case, the defendants moved for a directed verdict (R. 68). This motion was denied and the defendants declined to offer any testimony (R. 68, 69). The Government's motion for a judgment on the evidence produced, in the absence of any contradicting evidence offered by defendants, was denied (R. 69). The jury returned a verdict for the defendants and the court entered judgment on the verdict (R. 49). The Government's motion for judgment notwithstanding the verdict and, in the alternative, for a new trial was denied (R. 50, 58). During the pendency of the appeal one of the defendants died and his administrators were substituted (R. 84, 126). On appeal the court below adverted to numerous prejudicial errors committed by the trial court, found that the

Government's uncontradicted evidence established the defendants' liability beyond question, and directed the entry of judgment for the United States in the amount of $84,710.06 (R. 91-106).

2. *The Uncontradicted Facts.*

The following facts, which are recited in the opinion of the court of appeals, are based upon the uncontradicted evidence:

The three defendants were Grannis, Sloan, and Jones (R. 1). Grannis and three others, not involved here, entered into a cost-plus-a-fixed-fee contract with the United States on December 10, 1940, for the construction of an anti-aircraft firing center at Wilmington, North Carolina, known as Camp Davis (R. 92). Sloan was Grannis' office manager and subject to his control (R. 92). Jones was Grannis' brother-in-law (R. 92).

a. *Pertinent Contract Provisions.* A fixed fee of $270,942, in addition to reimbursement for expenditures and rental for equipment, was to constitute complete compensation for the contractor's services including profit and overhead expenses (R. 92). The contractor was required "to the extent of his ability [to] take all cash and trade discounts, rebates, allowances, credits, salvage, commissions, and bonifications" and was required to deduct all such amounts "in determining the actual net cost of articles and materials of every kind required for the purpose of this contract" (R. 4, 9, 92). These amounts were required to be

deducted whether actually taken or not if they would have been allowed "except for the fault or negligence of the contractor" (R. 4, 9, 92). The contractor further agreed "at all times [to] use his best efforts in all acts hereunder to protect and subserve the interests of the government" (R. 5, 9).

Under the contract rental for equipment owned by the contractor was to be based on actual cost for new equipment and replacement cost new for used equipment (R. 93). When the total rental paid equalled the value of the equipment, plus one per cent per month during its use, title vested in the Government and no further rental was to be paid (R. 92-93). The rental schedule for the contractor's equipment allowed reimbursement for depreciation, taxes, insurance, storage, and interest on the investment, but excluded profit (R. 93).

Rental paid for the use of equipment owned by third parties was allowed as an expenditure under the contract (R. 93). The rental contract with a third party was required to provide for vesting title in the Government when the total rental paid equalled the value placed on the equipment (R. 93). Third party rental charges, however, contemplated a profit to the owner, and third parties were not required to account for rebates received in the purchase of equipment (R. 93). Thus the rental allowed the contractor for third party equipment exceeded rental allowed for his own equipment (R. 93).

b. *Transactio*[n]*s Relating to False Claims Filed.*

Shortly after w[ork] under the contract began in December, 1940, [a] rental agreement was executed between Jones a[nd] the contractor, and 130 automobile trucks a[nd] cars were entered on the rental rolls in the nam[e] of Jones (R. 93). A separate schedule for ea[ch] of the 130 cars, initialed by Jones and the [the] contractor's representative,[1] was attached to the [the] agreement (R. 93, Tr. 82, 93).[2]

At the time o[f] these transactions, Jones was not in the automob[ile] business and did not own any automobile truc[ks] or cars (R. 94). He had neither the financial ab[il]ity nor bank credit to enable him to finance the p[ur]chase of this equipment (R. 94). Grannis, one o[f] the contractors, through his office manager, in f[act] furnished all the funds and financing nece[ssary] to acquire the equipment which was repr[esented] to be the property of Jones. The cars and [trucks] involved were purchased through accou[nts] established by Sloan in two banks at Fayet[teville, North Carolina, in the name] of "W. R. Jone[s by K. Sloan" (R. 94). The funds] for these accou[nts] were provided by bank loans totalling $77,0[91.37] which were guaranteed by Grannis and b[y a] cash deposit in the amount of

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[1] The court's o[pinion] inadvertently refers to the Government's representa[tive] instead of the contractor's representative (R. 93).

[2] "Tr." referen[ces] are to the transcript on file with the Court. See Stipul[ation, R. 124-125.]

$20,000 made by Grannis (R. 94). Jones had nothing to do with negotiating the loans and supplied no funds for the bank accounts (R. 94). Sloan controlled these accounts and was the only one authorized to draw checks on the accounts (R. 94). Although the accounts were in his name, Jones had no authority to make withdrawals (R. 94). Checks for rental of the equipment were forwarded by the contractor (Grannis and his co-adventurers) to Jones addressed to the post office box of Grannis and came into the possession of Sloan who deposited them in the accounts (R. 94).

Grannis and Sloan purchased the 130 vehicles in question without any participation by Jones and arranged to have the titles taken in the name of Jones although ownership was clearly in Grannis. The vehicles were then listed in the rental schedules attached to the Jones rental agreement at values greatly in excess of their cost to Grannis. Although the schedules for the first 80 items called for only the value of the equipment, the schedules for the remaining 50 included both value and cost new (R. 93-94). In either event, a figure substantially in excess of actual cost was always entered (R. 94).

In December 1940 a Chevrolet dealer at Fayetteville received an inquiry for new trucks from Grannis' office at Wilmington and offered him 25 used trucks (R. 95). Grannis came from Wilmington to Fayetteville with two Army officers, in-

spected the trucks, and ordered them delivered to Camp Davis (R. 95). On delivery, Sloan instructed the dealer to invoice them to Jones and title was taken in Jones' name (R. 95). Payment was made by checks signed "W. R. Jones by K. Sloan" (R. 95). Jones took no part whatever in the transaction (R. 95).

During January and February 1941, 54 Ford trucks and automobiles were purchased by Grannis from another dealer and placed on the rental rolls at Camp Davis under the Jones rental agreement (R. 95). Negotiations for the purchase were made by Grannis or Sloan (R. 95). The invoices, paid for out of the "W. R. Jones by K. Sloan" account, were made out in the name of Grannis but titles were obtained in the name of Jones (R. 95). As a fleet owner and purchaser of automobiles, Grannis was given a discount from the retail price but the equipment was scheduled at the higher price (R. 95). Three-quarter ton trucks invoiced to Grannis at $575 each were placed on the Jones rental schedule at $792 each; sedans invoiced to Grannis at $736.50 were placed on the Jones rental schedule at $951 (R. 95). Grannis obtained additional discounts under a fleet owner's agreement by certifying to the Ford Motor Company (Tr. 198-199, 234-235) that he was the purchaser and owner of the cars and by agreeing not to resell them (R. 95). The additional discounts Grannis obtained on these 54 cars and 23 other cars by certifying

he was the purchaser and owner totalled $1541 (R. 95).

In February 1941, Grannis or Sloan bought over the telephone five Ford pick-up trucks and one station wagon at a discount from the regular retail list price (R. 95). The invoice issued in the name of Jones showed a sales price of $560 each for the five trucks and $848 for the station wagon (R. 95). The trucks were listed on the Jones rental schedule at $792 each and the station wagon at $1207 (R. 95-96). Payment for the cars was by check on the "W. R. Jones by K. Sloan" account (R. 96).

In January and February 1941, the sale of 17 Ford cars and trucks were shown on the dealer's books as made to W. R. Jones with a notation to charge Grannis (R. 96). The invoice showed the sales price $567.50 for each of the Ford trucks and $737.85 for the sedans (R. 96). The Jones rental schedule showed that the cost new of these vehicles was $792 each for the trucks and $990 for the sedans in December 1940 (R. 96).

In January 1941, Sloan, acting for Grannis, negotiated for the purchase of 28 new Plymouth cars, and after the delivery of the first of these cars to Camp Davis, Sloan instructed the dealer to invoice the cars in the name of Jones and payment was made by checks signed "W. R. Jones by K. Sloan" (R. 96). The invoice showed the sales price as

$742.95 each while the Jones rental schedule showed a cost new and present value of $951 (R. 96).

c. *Resulting Overpayments.* All of the 130 cars and trucks except 5 were taken over by the Government in accordance with provisions of the contract at the values listed on the Jones rental schedules plus one per cent per month during their use (R. 96). Claims for reimbursement or payment of the rentals and recapture of the cars and trucks were presented to the Government in 10 vouchers and these claims were paid by the Government (R. 96). On the 125 cars taken over, the United States paid $28,914.71 more than it would have paid if the cars had been placed on the rental schedules as the property of Grannis at valuations based on actual cost to him (R. 96). This, together with overcharges of rentals on the 5 cars not taken over and the sum of $1,541 which Grannis received as a rebate from the Ford Motor Company but failed to account for to the United States as required by the contract, resulted in total overpayments by the United States of $32,355.03 (R. 96-97).

3. *The Judgments Below.* After denial of the Government's motion for a directed verdict, the district judge submitted the case to the jury under instructions which required it to find a conspiracy in order to find in favor of the Government (R. 97). The jury found by its verdict that no two defendants had conspired to defraud the United States and under the judge's instructions this put an end to the case (R. 97).

On appeal the court below found that the verdict, "which was surprising in view of the failure of the defendants to testify themselves or to offer any explanation of their conduct" (R. 98), might be explained by the following incidents of the trial: (1) over the Government's objections the special defense that the suit was barred because the defendants had been acquitted under a criminal indictment based upon identical matters was read to the jury (R. 98); (2) the instructions given to the jury minimized the failure of the defendants to testify or offer any testimony whatsoever (R. 99); and (3) defendants were permitted to have the opening and closing argument before the jury (R. 100).

The court held it was required to direct the entry of judgment for the United States under the rule that a verdict should be directed "when the facts are so convincing that reasonable men could not differ as to their significance" particularly "when there is no conflict in the evidence" (R. 100-101). The court stated that (R. 101):

> The mere recital of the uncontradicted facts shows beyond all reasonable doubt that the cars and trucks, ostensibly rented to the contractors as the third party equipment of Jones, actually belonged to Grannis, and were listed in Jones' name so as to fraudulently increase the rental payable by the United States. Jones himself was unable to finance the business; the negotiations for the purchase of the cars were conducted by Jones [3] and Sloan; the discounts on

[3] Grannis was obviously intended rather than Jones. See R. 102.

> the purchase price were claimed and allowed on the assumption that Grannis was the buyer; the rebate on the purchase price of the Ford cars was paid to and retained by Grannis; the arrangements with the banks for financing the purchases were made by Grannis and Sloan; the purchase money was furnished by Grannis or borrowed on his credit; the monies on deposit in the banks were subject to withdrawal only by Sloan, and the checks from the rentals paid by the United States were delivered to Sloan and deposited in the banks, subject to his order.

The result would be the same, the court pointed out, even if the cars were technically the property of Jones, in view of the contractor's obligation to use his best efforts in all acts under the contract to protect and to subserve the interest of the Government, the overstatement of the valuation of the equipment, and the misstatement of its cost in the schedules prepared and submitted by defendants in support of the claims filed (R. 102).

After holding that the uncontradicted facts demonstrated "beyond all reasonable doubt" that the defendants had participated in the filing of false claims against the United States (R. 101), the court stated further that "the unfavorable inferences against the defendants, which are justified by these facts, are fortified beyond all reasonable doubt by the failure of the defendants either to testify themselves or to offer any testimony on their own behalf" (R. 103).

During the pendency of the appeal, the defendant Grannis was killed in an airplane accident (R. 84) and the administrators of his estate were substituted (R. 126). The court below rejected the special defense that the suit abated as one based upon a penal statute (R. 103-105). In reliance upon *United States ex rel. Marcus* v. *Hess,* 317 U. S. 537, a suit for damages under R. S. 3490 was held to be a civil action and therefore within the saving provisions of 28 U. S. C. 2404 (R. 103-104).

The court held that the Government was entitled to recover double the sum of its actual damages of $32,355.03, namely $64,710.06, and an additional amount of $2,000 for each of the 10 vouchers covering the fictitious claims based on the Jones rental schedules presented to the United States, for a total of $84,710.06 together with costs (R. 105-106). The judgment of the district court was reversed and the case remanded with direction to enter judgment for the United States in this amount (R. 106).

ARGUMENT

1. Petitioners assert they have been denied their constitutional right to a jury trial because (1) the Government tried the case on a theory of conspiracy to violate the false claims statute but judgment was awarded on the basis of individual violations of the statute, and (2) judgment notwithstanding the verdict was directed to be entered for the United States although there was some evidence from which reasonable men could find

a verdict for defendants. No question of compliance with the procedural requirements of Rule 50 of the Federal Rules of Civil Procedure is raised by the petition. The Government moved for a directed verdict at the close of the evidence and for judgment notwithstanding the verdict within 10 days after the verdict was returned (R. 50, 58, 69). Cf. *Cone* v. *West Virginia Pulp & Paper Co.*, 330 U. S. 212; *Globe Liquor Co.* v. *San Roman*, 332 U. S. 571. Moreover, the petition does not rely upon any legal principle with respect to the right to a jury trial with which we disagree. We would agree that where different facts were involved a judgment directed on one theory in a case tried on another would be improper. Cf. *Fountain* v. *Filson*, No. 542, this Term, decided April 18, 1949. We would also agree that if there was room for an honest difference of opinion over any of the factual issues in controversy the question should have been committed to the determination of a jury. We believe no question for certiorari is presented, however, because as a factual matter there is no foundation in the record for the asserted denial of the right to a jury trial or for the other errors alleged with respect to the judgment on the evidence.

a. The first reason assigned for the granting of the writ is that the court of appeals held each of the defendants had individually violated the false claims statute "although the case was tried in the court below solely on the question of conspiracy"

(Pet. p. 10). There is no foundation in the record, however, for the assertion either that the case was tried "solely on the question of conspiracy" or that the court below based its judgment on a theory of individual violations of the false claims statute.

The Government based its case throughout the trial on the theory of both individual fraudulent acts and a conspiracy to defraud the United States. This position was consistently made clear and it is difficult to understand how anyone could possibly have thought otherwise. The complaint plainly sets forth the charges of individual and conspiracy violations (R. 5). The charges of violations in both respects were read to the jury (R. 12). During the course of the trial, government counsel referred to the case as having an "element of conspiracy" (Tr. 60) and left no doubt in the mind of the judge that its case did not depend upon proof of a conspiracy (Tr. 457). The issues tendered by the Government for submission to the jury again made clear its reliance upon both individual and conspiracy violations (R. 16-17). There is, therefore, no basis whatever for petitioners' bald assertion that the case was tried solely on the theory of conspiracy.

The only supporting reference (R. 67) cited by petitioners (Pet. p. 2) relates to the statement made by government counsel in connection with the admissibility of evidence that "this is a conspiracy case" which, of course, it was. The charge

of conspiracy in the complaint obviously would bring into play rules of evidence pertinent to conspiracy cases. But this falls far short of even suggesting that the Government was abandoning its allegations of individual violations. Moreover, even if the Government had abandoned all but the conspiracy charges, it cannot be said that the court below based its judgment on a theory of individual violations. The opinion does not specifically state whether its holding was predicated upon individual or conspiracy violations. Its language seems to make clear, however, its view that both charges were established beyond question by the uncontradicted evidence (R. 91-103).

b. Petitioners' assertion that it was deprived of a jury trial because there was some evidence from which reasonable men could find a verdict in their favor is similarly not supported by the record. As previously pointed out, the defendants did not testify themselves and offered no evidence. There is therefore no problem of weighing the credibility of witnesses or resolving conflicts in the evidence. All of the essential elements of the Government's cause of action were established by uncontradicted testimony. Misrepresentations were made to the Government with respect to the true ownership of the equipment and with respect to its cost and value. Rebates and discounts to which the Government was entitled were concealed. Claims embodying these misrepresentations and concealments were filed and paid by the Govern-

ment. All of the defendants contributed to the misrepresentations and the filing of the false claims. On these facts defendants were liable to the United States under the false claims statute as a matter of law. *United States ex rel. Marcus* v. *Hess,* 317 U. S. 537.

Petitioners urge a different interpretation of ownership although they offered no testimony to explain the undisputed evidence. But even if reasonable men could find that Jones was the actual owner of the equipment the result would be the same. Although this might raise some question of the effect of Grannis' obligations to obtain all available discounts and rebates for the Government and to act at all times to best serve the Government's interest, it would not change the character of the misrepresentations of the actual cost and value of the equipment upon which the false claims were made and paid. This is clearly a case, therefore, in which "without weighing the credibility of the witnesses, there is in the evidence no room whatever for honest difference of opinion over the factual issue in controversy." *Galloway* v. *United States,* 319 U. S. 372, dissenting opinion at 407. The granting of judgment notwithstanding the verdict in these circumstances does not deprive petitioners of a jury trial. See *Galloway* v. *United States, supra,* majority and dissenting opinions; *Montgomery Ward & Co.* v. *Duncan,* 311 U. S. 243, 254; *Brady* v. *Southern Ry. Co.,* 320 U. S. 476, 479-480.

c. Petitioners also contend that error was committed by the court below "in holding that the failure of these defendants to take the stand and testify in their own behalf or offer testimony proves beyond all reasonable doubt their guilt under the statute" and in directing a judgment for the United States without finding that the defendants knew the claims were false (Pet. pp. 9-10). The fact is that the court below did not depend upon the failure of defendants to testify or offer testimony to establish the Government's cause of action. Relying entirely on the Government's affirmative and uncontradicted evidence, the court found that a fraud had been perpetrated upon the United States "beyond all reasonable doubt" (R. 101). It added thereafter that "the unfavorable inferences against the defendants, which are justified by these facts, are *fortified* beyond all reasonable doubt by the failure of the defendants either to testify themselves or to offer any testimony on their own behalf." (Emphasis supplied, R. 103.) With respect to the defendants' knowledge of the falsity of the claims filed, the court's opinion makes unmistakably clear that no innocent or inadvertent misrepresentations were involved in the case. See particularly R. 101-103.

2. The court below correctly held that the action did not abate with respect to defendant Grannis upon his death. No conflict is asserted, and this determination does not warrant review by this Court. 28 U. S. C. 2404 specifically provides that

"A civil action for damages commenced by or on behalf of the United States * * * shall not abate upon the death of a defendant." *Supra*, p. 4. In *United States ex rel. Marcus* v. *Hess*, 317 U. S. 537, this Court held that a suit under the same statute involved in this case "does not lose the quality of a civil action because more than the precise amount of so-called actual damage is recovered" and that "the chief purpose of the statutes here was to provide for restitution to the government of money taken from it by fraud, and that the device of double damages plus a specific sum was chosen to make sure that the government would be made completely whole" (pp. 550, 551-552). This holding of the Court, together with the language of the statute, is dispositive of the question urged for review. Although the *Hess* case dealt with the question of double jeopardy, its conclusion with respect to the nature of the action is equally applicable here. Moreover, there is no reason to believe that Congress was less concerned with making the Government whole where it suffered monetary damage through the filing of fraudulent claims than in other cases of monetary damage. In fact, it appears that in the enactment of the provisions here involved, Congress contemplated that the Government might pursue its remedy not only against a fraudulent contractor but also against "his estate and his heirs" to recover "the money of which it is defrauded." Cong. Globe, 37th Cong., 3d sess., p. 958.

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be denied.

Respectfully submitted,

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